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No. 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
THE UNITED GAS IMPROVEMENT COMPANY,
THE LONG ISLAND LIGHTING COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S BRIEF

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No. 26

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October Term, 1965

Ocean Drilling & Exploration Company,
Petitioner,

v.

Federal Power Commission,
Public Service Commission of The State of New York,
The United Gas Improvement Company,
The Long Island Lighting Company,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S BRIEF

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (R. 619-42) is reported at 335 F. 2d 1004. The opinions and orders of the Federal Power Commission (R. 549-93, 606-17) are reported at 30 FPC 283 and 682.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 14, 1964 (R. 643-44). By order dated November 6, 1964, Mr. Justice Black extended the time for filing a petition for writ of certiorari to Novem-

ber 23, 1964 (R. 644). The petition was filed on that date, and certiorari was granted on March 8, 1965 (R. 646). Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether the Federal Power Commission has authority under section 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates?

STATUTES INVOLVED

The Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717a - 717w, and particularly § 7(e) and § 19(c) of that Act.

> § 7(e). Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.
>
> • • • •

§ 19(c). The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

STATEMENT

This case involves the authority of the Federal Power Commission under section 7(c) of the Natural Gas Act to award reparations of amounts collected by Ocean Drilling & Exploration Company (ODECO) for sales of natural gas pursuant to unconditional permanent certificates of public convenience and necessity previously issued by the Commission.[1] At the outset it should be noted that ODECO is also a Respondent in Nos. 21, 22 and 32 which have been consolidated for argument with this case.[2] In these other appeals ODECO supports the decision below.

1. Permanent Certification of the Contracts with Hope Natural Gas Company

ODECO is a small independent producer[3] whose natural gas producing operations are confined to the Southern Louisiana area. In 1958 ODECO entered into two

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[1] Petitions for certiorari raising the reparations issue have been filed by J. R. Frankel, *et al* (No. 34), J. Ray McDermott & Co., Inc. (No. 35), and The Superior Oil Company (No. 36). The Court has not acted on these petitions.

[2] These cases are appeals from the decision of the court below by United Gas Improvement Co., *et al*, the Public Service Commission of New York, and the Federal Power Commission, respectively.

[3] According to "Sales by Producers of Natural Gas to Natural Gas Pipeline Companies — 1963" issued by the Commission in January 1965, ODECO's sales of natural gas (5,171,000 Mcf) were less than 1% of those by the largest producer, Phillips Petroleum Company (613,624,000 Mcf).

contracts with Hope Natural Gas Company which provide for an initial price of 21.5¢ per Mfc plus tax reimbursement of 2.05¢ per Mcf.[4] In accordance with section 7 of the Act and the regulations promulgated thereunder, ODECO sought certification of these sales. In Opinion No. 327 the Commission granted ODECO unconditional permanent certificates of public convenience and necessity authorizing the sales of gas to Hope at the proposed initial contract price (R. 116-41). The Commission expressly found that the record evidence supported the initial contract price as required by this Court in *CATCO*,[5] because "the prices are the same or lower than numerous other certificated sales in the area." (R. 134)

2. Judicial Review and the Proceedings on Remand

The Public Service Commission of New York (New York) sought judicial review of Opinion No. 327 but did not seek to stay its effectiveness. Accordingly, ODECO filed its contracts with the Commission as rate schedules and commenced deliveries of gas at the authorized price. The Court of Appeals for the District of Columbia[6] reversed the Commission because the record did not contain "the supporting evidence" required by *CATCO* to justify unconditional certification of ODECO's initial contract price. 287 F. 2d at 149. The court remanded the proceedings to the Commission to give the producers the further opportunity to augment the record to support unconditional certification of their contract prices.

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[4] The 2.05¢ per Mcf represents partial reimbursement of the 2.3¢ per Mcf State of Louisiana severance tax which ODECO is required to pay.

[5] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

[6] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied*, 365 U.S. 880 (1961).

After the mandate returned from the court of appeals the Commission, contrary to the procedure followed after the *CATCO* remand, did not issue ODECO temporary certificates containing refund conditions to replace the original permanent certificates. Instead, by order issued May 10, 1961 (R. 376-84) the Commission consolidated the remanded proceedings with the area rate proceeding applicable to sales from southern Louisiana.[7] The matter remained dormant until January 10, 1962, when the Commission issued an order warning ODECO[8] that at the conclusion of the remanded proceedings it intended, to the extent it was empowered to do so, to grant refunds of all amounts collected in excess of the price finally certificated (R. 395). In denying ODECO's application for rehearing of the January 10, 1962, order,[9] the Commission severed its certificate proceedings from the southern Louisiana area rate proceeding and consolidated them for hearing with other remanded producer-certificate proceedings (R. 410). Thereafter, hearings were held before a presiding examiner at which ODECO presented extensive evidence to support unconditional certification of its initial contract price. The examiner issued his decision on December 7, 1962 (R. 491). Appeals to the Commission were filed by various parties including ODECO.

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[7] During the interim between the issuance of Opinion No. 327 and the subsequent remand by the court of appeals, the Commission initiated area pricing by *Statement of General Policy No. 61-1,* issued September 28, 1960. 24 FPC 818 (1960).

[8] This was the first notice that ODECO had that the Commission intended to order retroactive refunds.

[9] ODECO sought judicial review of the January 10, 1962, order. By order issued September 20, 1963 the Court of Appeals for the Fifth Circuit dismissed ODECO's Petition for Review in No. 19663 "without prejudice to the rights of Petitioners to attack the validity of the orders herein involved in petition to review if timely and properly filed, the orders of July 17, 1963, in the Commission's opinion No. 398."

3. The Decision Below

In Opinion No. 398 (R. 549-93) the Commission adopted the Examiner's decision, with certain modifications not pertinent here. In particular, the Commission reissued permanent certificates to ODECO conditioned upon a total initial price of 20¢ per Mcf, including tax reimbursement. The Commission gave retroactive effect to the price reduction by ordering ODECO to refund all amounts collected in excess of the conditioned price from the date of initial delivery, plus 7% interest. Commissioner O'Connor dissented on the ground that he could not join "an unconditional order of refunds without provision for a retroactive price increase to effect evenhandedly the correction of the earlier error." (R. 589). On rehearing, the Commission granted the producers' request for a stay of the retroactive refund requirement. (R. 606-17)

ODECO filed a petition for review and application for a stay of the rate reducing portions of Opinion No. 398 in the Court of Appeals for the Fifth Circuit.[10] In its decision, the Fifth Circuit recognized that "Under the structure of the Act, it has long been recognized, and never questioned, that '* * * under the Act the Commission has no power to make reparation orders. . . .'" (R. 638). However, the court held, *inter alia*, that the Commission had "inherent power" to require refunds but that the Commission must first make a just and reasonable rate determination under either section 4 or 5 of the Natural Gas Act to ascertain the amount of the refund (R. 639-40). The court also held that the Commission erred in excluding all cost and economic evidence; that the Commission erred in imposing a price increase moratorium on ODECO's permanent certificates; and that the con-

[10] The stay was granted subject to certain conditions by order issued November 12, 1963, a copy of which is printed in Appendix A.

ditioning of the "take or pay" clauses in ODECO's contracts on a future decision in a pending rule-making proceeding was not presently reviewable. Because of its remand for a further hearing to receive all pertinent evidence, the court found it "need not express any view" on the questions raised by ODECO pertaining to the validity of the "in-line" price determination used by the Commission to support its 20¢ price condition (R. 641).[11]

The petitions in Nos. 21, 22 and 32[12] involve issues as to the latter holdings of the court below. The only issue to be decided on this appeal is: Does the Federal Power Commission have authority under section 7(e) of the Natural Gas Act to award reparations under the circumstances of this case. The pertinent circumstances are: ODECO received permanent certificates; New York sought judicial review and did not obtain a stay or other available judicial relief; the reviewing court reversed the Commission's order granting permanent certificates because of the lack of substantial evidence to support the rate; the Commission did not vacate ODECO's permanent certificates and issue temporary certificates with express refund conditions as it had done in other remanded cases; after hearings on remand the Commission awarded a lower rate; the Commission retroactively applied this lower rate by awarding reparation of amounts collected from the date of initial deliveries of gas until the date of the Commission's order.

SUMMARY OF ARGUMENT

1. Section 7 of the Natural Gas Act does not expressly authorize the Commission to order retroactive refunds or award reparations and such power cannot properly be

[11] The court also found "it inappropriate at this time to express any views as to interest or the rate, if interest is to be allowed." (R. 640).

[12] See footnote 2, *supra*.

implied. Under section 7 the Commission performs a legislative function and does not have inherent power to dispense equity. Further, the courts should not ascribe such inherent power to the Commission because there is an almost conclusive presumption against the power to take retroactive action unless Congress plainly specifies such power.

2. The statutory scheme of regulation under the Natural Gas Act and the equitable powers of the courts could have afforded sufficient protection to any party seeking review of the Commission's orders issuing unconditioned permanent certificates to ODECO.

Part of the amounts which the Commission ordered ODECO to refund were collected while judicial review instituted by New York was pending. During this period, from August 10, 1959, to April 24, 1961, the Commission's unconditional certificate orders became operative because under section 19(c)[13] of the Act, New York's appeal did not operate as a stay. Moreover, under the statutory scheme of regulation the statutory and equity powers of the courts to postpone the effective date of any agency action and to issue orders to preserve the *status quo* pending conclusion of judicial review were available to prevent ODECO from unconditionally collecting and retaining a rate which New York considered to be too high. Certainly, it was not incumbent upon ODECO to seek "interim protective relief" from the presumptively valid orders of the Commission granting unconditional permanent certificates.

After the court of appeals issued the mandate remanding the orders granting ODECO's unconditional permanent certificates, the Commission had authority under section 7 of the Act to provide additional protection.[14] The mandate

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[13] 15 U.S.C. § 717r.

[14] Of course, if New York had obtained a protective order pending its appeal, that order could have remained in effect until the Commission completed the remanded proceedings.

was issued by the court of appeals on April 24, 1961 and the Commission granted ODECO conditioned permanent certificates on July 17, 1963. During this period, April 24, 1961 to July 17, 1963, the Commission, on its own motion, could have vacated ODECO's original permanent certificates and issued new temporary certificates with appropriate prospective refund conditions. This is the procedure contemplated by the Act and was followed by the Commission upon receipt of the mandate in *CATCO* and other remanded certificate cases.

ARGUMENT

I.

THE FEDERAL POWER COMMISSION DOES NOT HAVE AUTHORITY UNDER SECTION 7 OF THE NATURAL GAS ACT TO ORDER RETROACTIVE REFUNDS

1. Rate Provisions of the Act

The Commission derives its powers with regard to the regulation of natural gas producers from the provisions of the Natural Gas Act. Sections 4, 5 and 7[15] of the Act set forth the standards to be used in regulating the rates charged by natural-gas producers. The interrelation of these three sections was summarized by Judge Skelly Wright in *Atlantic Ref. Co.* v. *FPC*, 316 F. 2d 677 (D.C. Cir. 1963) when he stated:

> "... Section 7 provides that '[n]o natural-gas company * * * shall engage in the transportation or sale of natural gas * * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations.' The burden of proving the public convenience and necessity is, of

[15] 15 U.S.C. §§ 717c, 717d and 717f, respectively.

course, on the natural gas company and, as indicated, the price of the gas is one of the prime considerations.

"Section 4 of the Act authorizes a natural gas company to increase the price of its gas, provided, of course, there is no limiting contract with the purchaser, but incorporates a mechanism for the recovery of the increase by the purchaser if the Commission, after hearing, disallows it. Unlike Section 7, Section 4 contemplates a full rate proceeding with the burden on the company to prove that the rate as increased is 'just and reasonable.' Section 5 also provides for a rate proceeding limited to testing the validity of an existing rate. A Section 5 proceeding is initiated by the Commission upon its own moton or upon complaint of parties interested in reducing the rate. As under Section 4, the 'just and reasonable' test is applied, but there is no mechanism for the refund of overcharges pending the proceeding and the burden of proof is on the Commission. In practice Section 5 has proved relatively ineffective because of the difficulty the Commission has experienced in controlling the length of the rate proceedings and there is no consumer protection during their pendency. Consequently, the burden of protecting the public interest has fallen on Sections 7 and 4 where the burden of proof is on the independent producer.

* * *

"In arriving at initial rates under Section 7, the Commission, of course, does not foreclose a company from obtaining an increase under Section 4. As indicated, Section 4 is a rate proceeding and Section 7 is not. But the public must be protected from the time the gas first enters interstate commerce. *Since there is no mechanism for refund of overcharges under Section 7,* if the Commission is to err in setting an initial rate, it should err on the low side because the company, under Section 4, can immediately increase the rate, subject to disallowance by the Commission after a full rate proceeding, the public being protected with reference to refund in the interim." (Footnotes omitted) (Emphasis supplied) 316 F. 2d at 678-79.

Section 4 of the Act provides that if the Commission suspends a proposed rate increase and later finds such increase unjustified, it may order refund of amounts previously collected pursuant to an express refund obligation. This is the only provision of the Act authorizing the Commission to require refunds. Under section 5 of the Act, the Commission may investigate existing rates, but if it finds them too high, its only power is to order that such rates be reduced prospectively. As a result, natural-gas companies are allowed to keep revenues obtained from past rates which are determined under section 5 to be excessive. In section 5, Congress had a unique opportunity to permit the Commission to set retroactive rates and award reparations as had been provided in the Interstate Commerce Act.[16] Instead, Congress confined the Commission to fixing rates "to be thereafter observed."

In the present case, the Commission isued certificates to ODECO pursuant to section 7 which empowers the Commission to issue certificates of public convenience and necessity for proposed natural gas sales found to be consistent with the public interest. However, as under section 5, the Commission is not granted the power under section 7 to order refunds or set retroactive rates. Instead, section 7(e) vests the Commission with prospective powers, providing that:

> ". . . a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service, . . . *is or will be required by the present or future public convenience and necessity;* otherwise such application shall be denied." (Emphasis supplied.)

From a practical standpoint, the circumstances in which the Commission's reduced ODECO's certificated

[16] 49 U.S.C. § 9.

rates on remand involved a typical section 5 situation. The Commission had approved ODECO's contract prices in Opinion No. 327. When ODECO commenced deliveries of gas, its permanent certificates and filed rate schedules, although being judicially challenged, became effective and constituted the requisite authority for such deliveries. *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316 (1961). Until changed prospectively, the rate approved by the Commission was the existing legal rate which ODECO was required to charge and the pipeline was obligated to pay. In discussing analogous rate provisions of the Federal Power Act which were the genesis of similar provisions in the Natural Gas Act, this Court stated:

> "[A company] can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951).

When the Commission determined in Opinion No. 398 that the rate it had previously approved was too high, its only power was to set the rate "to be thereafter observed." Under the statutory scheme of regulation, it is immaterial whether the proceedings terminating in the rate reduction resulted from judicial reversal of unconditional certificates or a section 5 investigation instituted by the Commission on its own motion.

2. Under Section 7 the Commission's Powers Are Quasi-Legislative

It is well established that in approving rates administrative agencies perform a quasi-legislative function and, therefore, cannot award reparations on account of past rates. Thus, in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*,

284 U.S. 370 (1932), this Court held that where an unreasonable rate has been prescribed by the Interstate Commerce Commission because of inadequate evidence or erroneous facts, there is no power to award refunds for the resulting exaction of unreasonable rates. The Court premised its decision on the legislative character of the rate and held when the Interstate Commerce Commission approves a maximum, reasonable rate:

> "[it] declares a specific rate to be the reasonable and lawful rate for the future it speaks as the legislature, and its pronouncement has the force of a statute." 284 U.S. at 386.

The Court then continued:

> "The carrier cannot charge a rate so prescribed and take its chances on an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission. If that body sets too low a rate the carrier has no redress save a new hearing and the fixing of a more accurate rate for the future. It cannot have reparation from the shippers for a rate collected under the order upon the ground that it was unreasonably low. This is true because the Commission in naming the rate, speaks in its quasi-legislative capacity." 284 U.S. at 387, 388.

> "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate . . . the Commission . . . may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated, in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." 284 U.S. at 389.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908), Mr. Justice Holmes described the difference between the legislative and judicial functions of an administrative agency as follows:

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial. . . ." 211 U.S. at 226.

This fundamental distinction between quasi-legislative and quasi-judicial powers has been applied to the Commission's authority under the Natural Gas Act.[17] In *Hope Natural Gas Co.* v. *FPC*, 134 F. 2d 287 (4th Cir. 1943), the court held that the Commission was given only quasi-legislative powers and did not have "authority to fix rates for the past or to award reparations on account of past rates." The court stated:

> "The fundamental difference between quasi-legislative and quasi-judicial power is that the one is concerned primarily with prescribing regulations of the future, the other with determining rights in the light of what has occurred in the past. Cf. Baer Bros. v. Denver & R. G. R. Co., 233 U.S. 479, 486, 34 S. Ct. 641, 58 L. Ed. 1055. The Natural Gas Act shows clearly that it was the intention of Congress to give the Commission quasi-legislative power, i.e., regulatory power as to the future rates; but there is no indication of any intention to clothe it with judicial or quasi-judicial powers with respect to past charges or practices, such as was vested

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[17] The dichotomy between quasi-legislative and quasi-judicial powers has been determinative in numerous state cases involving the power of regulatory agencies to order retroactive refunds. See, *e.g.*, *Pacific Tel. & Tel. Co.* v. *Public Util. Comm.*, 401 P. 2d 353 (Cal. 1965); *Michigan Bell Tel. Co.* v. *Michigan Pub. Serv. Comm'n*, 315 Mich. 533, 24 N.W. 2d 200, 205-06 (1946); *Mandel Bros. Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954).

in the Interstate Commerce Commission by section 9 of the Interstate Commerce Act. 49 U.S.C.A. § 9. As the Commission itself says, it was not given authority to fix rates for the past or to award reparations on account of past rates. If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions. No intention on the part of Congress to vest any such unusual power in the Commission ought to be indulged unless conferred in the plainest terms; and not only it is not plainly given here, but such power cannot be spelled out of the statutes on any theory of interpretation with which we are familiar." 134 F. 2d at 309-10.

Reversing on other grounds, this Court in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) acknowledged:

"... It is conceded that under the Act, the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.'" 320 U.S. at 618.

See also *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *T.I.M.E.* v. *United States*, 359 U.S. 464 (1959).

Even more pertinent to the present case is *Panhandle Eastern Pipeline Co.* v. *FPC*, 236 F. 2d 289 (3d Cir. 1956) where the court held that the Commission acts in a legislative capacity in proceedings which involve the issuance of certificates of public convenience and necessity under section 7 of the Act. In discussing the inapplicability of the principles of *res judicata* to section 7 certificate proceedings, the court noted that when the Commission determines issues under the standard of public convenience and necessity, it:

"... is exercising delegated legislative power to make a rule to guide the conduct of the parties in the future.

It is not exercising quasi-judicial power to determine past or present rights or liabilities. . . ." 236 F. 2d at 292.

This conclusion naturally follows from the fact that the Commission's power to issue certificates under section 7 is dependent upon its determination that the proposed sale is "required by the present or future public convenience and necessity." See *Pittsburgh* v. *FPC*, 237 F. 2d 741, 752 (D.C. Cir. 1956). Accordingly, when the Commission issued the conditioned certificates to ODECO at the conclusion of the remanded proceedings, it was exercising quasi-legislative powers and therefore did not have the authority to fix rates for the past or award reparations on account of past rates.

3. Presumption Against Power To Issue Retroactive Orders

The court below acknowledged that the Commission did not have power under the Natural Gas Act to issue reparation orders but proceeded to find "inherent power" which the Commission could exercise to order retroactive refunds in this case (R. 637-41). However, the court concluded that consumers were not entitled to less than a "just and reasonable" rate and, accordingly, held that the Commission could not order refunds until after a "just and reasonable" rate was established.[18] In finding this "inherent power,"

[18] The Commission ordered refunds in this case without any inquiry as to the effect of its order. It refused to consider any of the cost and economic evidence proffered by ODECO which would have shown the inequity in ordering retroactive refunds. The court below held that the Commission erred in excluding such evidence. This is one of the questions before this Court in Nos. 21, 22 and 32. Assuming *arguendo* that the Commission has "inherent power" to order refunds, it is ODECO's position that such a far-reaching decision should not be made blindly, but rather with a fully developed record showing the equities, particularly the economic impact on all parties involved.

the court did not cite the Natural Gas Act or any other authority. ODECO assumes that the court found the "inherent power" in the Act since the Commission has only the powers conferred upon it by statute.

As discussed above, the Commission was not granted the quasi-judicial power to dispense equity as if it were a court of law. As this Court has observed with respect to the powers of the Federal Trade Commission:

> "The Commission is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the Act authorizes . . . but, that accomplished, (it) has not the additional powers of a court of equity to grant other and further relief . . . on the theory that this is necessary to render effective the prescribed statutory remedy. . . ." *Arrow-Hart & Hegeman Elec. Co.* v. *FTC*, 291 U.S. 587, 598 (1934).

See also *FTC* v. *Eastman Kodak Co.*, 274 U.S. 619, 623 (1927), where this Court pointed out that the Federal Trade Commission had not been delegated the authority of a court of equity and, accordingly, on review the court of appeals was limited to the question of whether the Commission properly exercised the administrative authority granted by statute, and could not sustain or award relief beyond the power of the Commission.

Further, there is a strong presumption that retroactive powers will not be implied but must be clearly expressed in the governing statute. Thus, in *Brimstone R.R. & Canal Co.* v. *United States*, 276 U.S. 104 (1928), this Court denied the retroactive operation of an administrative regulation promulgated by the Interstate Commerce Commission, stating:

> "The power to require readjustments for the past is drastic. It may reasonably exist [as specifically permitted by statute] in cases where the particular rate has been approved by the Commission after full hear-

> ing: it ought not to be extended so as to permit unreasonably harsh action without very plain words." 276 U.S. at 122.

Accord, United States v. *Baltimore & Ohio R.R. Co.*, 284 U.S. 195 (1931).

Likewise, in *Claridge Apartments Co.* v. *Commissioner*, 323 U.S. 141 (1944), this Court stated:

> "Retroactivity, even where permissible, is not favored, except upon the clearest mandate. It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed." 323 U.S. at 164.

Similarly, this presumption against retroactivity was recognized in *Transcontinental & Western Air, Inc.* v. *CAB*, 169 F. 2d 893 (D.C. Cir. 1948), *aff'd*, 366 U.S. 601 (1949), where the Court said:

> "In the first place we are met with the almost conclusive presumption against the power to take retroactive action unless Congress plainly specifies such power." 169 F. 2d at 894.

The state courts have also held that this power of an administrative agency will not be implied in the absence of express statutory authorization. See, *e.g.*, *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954). A prime example is *Michigan Bell Tel. Co.* v. *Michigan Pub. Serv. Comm'n*, 315 Mich. 533, 24 N.W. 2d 200 (1946), where the court was confronted with the contention that the Public Service Commission has implied powers to retroactively adjust rates previously fixed. The Michigan statutes vested the Commission with very broad powers but did not expressly permit retroactive refunds. In holding that the Commission did not have any such implied power, the Michigan Supreme Court stated:

> "For the state to prescribe utility rates, forbid the utility to charge any other rate, and then say that

those rates may be declared unjust and unreasonable as applied to executed transactions shocks the conscience. *Under such a rule how could the utility order its affairs?* . . . What then becomes of the commitments the utility may have made in the belief that the sums it has earned and collected belonged to it? Reason, common fairness and precedent combine to establish the rule that the charter of a commission's powers should not be construed to permit it to impugn its own legislative acts with retroactive effect unless the statutes affirmatively require such a construction." 24 N.W. 2d at 206. (Emphasis supplied.)

The logic in this presumption against retroactivity is irrefutable. The Natural Gas Act, like the other acts creating Federal regulatory agencies, provides a comprehensive scheme of regulation. Retroactive refund power is neither necessary nor desirable, since its effects are drastic and inconsistent with proper utility regulation. There must be some point — permanent certification — where the regulated company can rely upon Commission orders.

In summary, the Natural Gas Act does not give the Commission power to order retroactive refunds except under section 4, which is not applicable in this case. There is a strong presumption against retroactive power. The "inherent power" found by the court below does not exist. The only possible argument to support "inherent power" would be if the Act were somehow deficient in affording adequate protection to the consuming public, but as will be pointed out, the Act provides full protection to the consumer.

4. Policy Considerations Underlying the Lack of Retroactive Refund Power

There are sound policy reasons why the statutory scheme of regulation contained in the Natural Gas Act does not include the power to award retroactive refunds in a section 7 certificate proceeding. Producers of natural gas, like

other businesses, must pay federal income taxes, predict a cash flow, borrow money, pay expenses, meet payrolls, and unlike other businesses, pay royalty owners, state severance and production taxes, and reinvest funds in further exploration and development activities. As a practical matter, these day-to-day operations cannot be conducted if the producer is unable to rely upon unconditional permanent certificates granted by the Commission which have become effective. Once a producer is permitted to commence deliveries without refund condition, he and everyone else should be entitled to rely upon the authorized rate until prospectively changed by the Commission. If the authorized rate is subsequently determined to be too low, a higher rate cannot be retroactively imposed. See *Arizona Grocery Co.* v. *Atchison T. & S.F. Ry. Co.*, 284 U.S. 370 (1932). The converse is likewise true: when the authorized rate is subsequently determined to be too high, it cannot be retroactively reduced by awarding reparations.

Nor should an appeal of the order authorizing the rate be of significance. Under the statutory scheme of regulation if the complaining party wishes to impose a refund condition, he must obtain a stay or other protective order from the courts. To hold that in the absence of such an order a producer may not rely upon a permanent certificate granted by the Commission merely because it is being appealed would clothe the appealing party with regulatory powers vested exclusively in the Commission and the courts. Such a holding would require the producer to rely upon the allegations of an appealing party rather than the presumptively valid order of the Commission. Certainly a producer cannot be expected to paralyze his business during such an appeal.[19]

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[19] As exemplified by the present case, such appeals of administrative orders and remanded proceedings are extremely lengthy and may take more than five years.

The need for certainty as to the effect of Commission orders is obvious. Without it long range planning is impossible, as are financing arrangements which must necessarily rely on the efficacy of Commission orders as to transactions consummated thereunder. The lack of certainty creates serious operating problems for all producers, but they are particularly acute for the small producer. He cannot assume the risk of irrevocably committing his gas to interstate commerce without knowing what part of the price he will ultimately be allowed to retain. In many cases the subject sales constitute a substantial portion of his prospective income. Thus, a small producer may be required to forego making sales authorized by the Commission until the appeal procedures are exhausted. This would place him at a serious competitive disadvantage with the larger producers who can commence deliveries and assume the risk of unknown retroactive refunds.

In short, the producer of natural gas must know the terms and conditions when he commits his gas to interstate commerce. In *Sunray Mid-Continent Oil Co.* v. *FPC,* 270 F. 2d 404 (10th Cir. 1959), the court held unlawful an express refund condition which obligated the producer to refund the difference between the initial contract price and whatever price the Commission ultimately found when a permanent certificate was issued. The court held that the Commission must either approve, reject or conditionally approve an application for a temporary certificate in such a manner as to permit the producer to make an informed judgment as to whether to dedicate his natural gas to interstate commerce. The rationale of *Sunray* is equally applicable in the situation where the Commission attempts to exercise retroactive refund power under section 7 in a remanded certificate proceeding. In the instant case the requirement of certainty which is necessary under the

Natural Gas Act would be clearly denied if the Commission could award retroactive refunds of amounts collected under permanent certificates.

II.

THE NATURAL GAS ACT PROVIDED A COMPLETE AND EFFECTIVE BOND OF PROTECTION FOR THE CONSUMER

On many occasions this Court has stated that the purpose of the Natural Gas Act is to "afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Ref. Co.* v. *Public Serv. Comm'n,* 360 U.S. 378, 388 (1959); *Wisconsin* v. *FPC,* 373 U.S. 294, 309-10 (1963). It is ODECO's position that the scheme of regulation contemplated by the Act provided such complete protection in this case. As detailed below statutory remedies were available; they simply were not utilized. The Commission should not be allowed to compensate for this failure to pursue these statutory procedures by belatedly awarding reparations.

1. The Availability of a Stay and Other Judicial Orders Provided Protection During the Pendency of New York's Appeal

The Commission issued Opinion No. 327 granting ODECO permanent certificates of public convenience and necessity on August 10, 1959 (R. 116-41). On September 8, 1959, New York filed a motion for rehearing alleging that the Commission erred by failing to condition ODECO's certificate to provide for a price of 18¢ per Mcf (R. 142-52). Rehearing was denied by the Commission on October 7, 1959. ODECO began deliveries to Hope on December 1, 1959. New York filed a petition for review in the Court of Appeals

for the District of Columbia Circuit on December 4, 1959, but did not ask that the Commission's order be stayed or for any other protective relief pending the conclusion of judicial review.

On December 8, 1960, the Court of Appeals for the District of Columbia Circuit reversed the Commision and remanded the proceedings to the Commission to give ODECO the opportunity to augment the record to support its contract prices.[20] On April 17, 1961, the Supreme Court denied petitions for writs of certiorari and on April 24, 1961, the Court of Appeals for District of Columbia Circuit issued its mandate. During this period December 1, 1959, until April 24, 1961, — *16 months* — the aggrieved party, New York, had an adequate and available remedy to prevent ODECO from unconditionally collecting and retaining a rate which New York considered to be too high. However, New York chose not to avail itself of the protection afforded by a stay or other protective judicial relief. As a result, on remand, New York urged that the Commission assume the power to order retroactive refunds. Eventually the Commission did assume this power although Congress did not grant retroactive refunding power to it under section 7 of the Natural Gas Act and such power is not necessary since the Act considered in conjunction with the powers of the Commission and courts provides adequate protection for parties contesting rates.[21]

Section 19(c) of the Natural Gas Act[22] provides in part:

> "The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered

[20] *Public Serv. Comm'n* v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960) *cert. denied*, 365 U.S. 880 (1961).

[21] Indeed, this Court has recognized that refunds are a "somewhat illusory" device of consumer protection. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154 (1963).

[22] 15 U.S.C. 717r.

> by the court, operate as a stay of the Commission's order."

However, this does not preclude an appealing party from obtaining necessary orders to protect its position while the appeal is pending. Section 10d of the Administrative Procedure Act[23] provides:

> "Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

In *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U.S. 4 (1941), this Court held that regardless of the Administrative Procedure Act or the silence of the Federal Communications Act, the courts have inherent power to issue a stay:

> ". . . it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that, as part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." 316 U.S. at 10.

A stay of a regulatory agency's rate-making order pending judicial review and retroactive refund powers are mutually exclusive remedies for parties attacking the validity of a utility's rates. See, *e.g., Keco Indus., Inc.* v. *Cincinnati & Suburban Bell Tel. Co.,* 166 Ohio St. 254, 141

[23] 5 U.S.C. 1009(d).

N.E. 2d 465 (1957); *Mandel Bros., Inc.* v. *Chicago Tunnel Terminal Co.*, 2 Ill. 2d 205, 117 N.E. 2d 774 (1954). *Keco* arose because an order of the Ohio Commission *increasing* the telephone company's rates was reversed on appeal. After the mandate returned Keco Industries brought suit to recover the increased rates collected during the pendency of the appeal. The Ohio Supreme Court pointed out that the Ohio statutes provided that the filing of an appeal did not operate as a stay of the Ohio Commission's order and that the utility must continue to collect the rates set by the Commission. These provisions are practically identical to those found in the Natural Gas Act. The Ohio Court then held that since the Ohio General Assembly had provided a method whereby rates could be suspended pending judicial review (stay) there could be no recovery of increased rates collected during the pendency of the appeal, stating:

> "Common sense and reason lead us to a wholehearted endorsement of the conclusion, as is so well stated as follows in the opinion of Judge Hoy . . . :
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> 'It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953 order, of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes, a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute

equity in every conceivable situation.' " 141 N.E. 2d at 469.

Stays are frequently employed by parties appealing from rate orders of the Federal Power Commission. *Natural Gas Pipeline Co.* v. *FPC,* 128 F. 2d 481 (7th Cir. 1942) involved the disposition of a fund collected while a stay order was in force. The Commission had ordered a reduction of Natural's rates and pending judicial review Natural obtained a stay upon the condition that it file a bond of $1,000,000 in favor of the Commission and the Illinois Commerce Commission. Subsequently, this Court affirmed the Commission's rate reduction.[24] After affirmance the parties disagreed on the disposition of the fund created during the stay. In its second opinion, the Seventh Circuit concluded that it had the ancillary power to do complete justice as to the interests of all parties in the fund since the fund grew out of the court's equity jurisdiction.[25]

FPC v. *Interstate Natural Gas Co.,* 336 U.S. 577 (1949) illustrates the flexibility of stay orders which may be conditioned to permit the collection of challenged rates and at the same time afford protection to the appealing party. That case involved the disposition of a fund accumulated under a stay order issued by a court of appeals pending review of an order of the Commission reducing the rates of Interstate Natural Gas Co. Pursuant to the terms of

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[24] *FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 575 (1942).

[25] *Natural Gas* and the instant case differ from *Wilson & Co., Inc.* v. *FCC,* 335 F. 2d 788 (7th Cir. 1964), *cert. granted,* ..... U.S. ....., 1965 (No. 909, 1964 Term; renumbered No. 56, 1965 Term), where the question involved is whether the Seventh Circuit had a duty in equity once it had sustained the FCC's rate orders on the merits to require the carrier to return to customers excess rates *collected under a stay* during pendency of the appeal. In *Wilson,* unlike the present case, the parties sought a stay conditioned in a manner which would protect the consumer from paying an excessive price.

the court of appeals' stay order, the natural-gas company was required to deposit with the court the monthly difference between the payments under the existing rates and those required under the order of the Commission.[26]

In the court below, New York sought to justify its failure to seek the obvious protection afforded by a stay order by questioning whether it could have obtained a stay under the test stated in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958) and asserting that "the present petitioners proceeded at their own risk and cannot point to their self-inflicted losses as a ground for frustrating the judicial reversal of unconditioned certificates."[27] Apparently the first argument evolves thusly: New York would have been unsuccessful had it requested a stay; since New York could not have obtained a stay, there was no protection afforded by a stay, *ergo*, there was some additional power under the Natural Gas Act that would protect New York if its appeal was successful.[28] Quite apart from the fact that New York is now attempting to argue what might have occurred if a request had been made, it is obvious that New York could have obtained a stay in this instance. Four standards for obtaining a stay were reiterated in *Virginia Petroleum Jobbers Ass'n* v. *FPC*: First, the likelihood that petitioner will prevail on the merits on appeal (New York won on appeal which was brought because of this Court's *CATCO* decision); second, there will be irreparable injury to the petitioner unless a stay is granted (if the stay was not granted New York and the persons whom it represents would forever lose any "excessive" rates col-

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[26] See also *Socony Mobil Oil Company, Inc.* v. *Brooklyn Union Gas Co.*, 299 F. 2d 692 (5th Cir.), *cert. denied*, 371 U.S. 887 (1962); *State Corp. Comm'n* v. *FPC*, 215 F. 2d 176 (8th Cir. 1954); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 179 F. 2d 896 (8th Cir. 1950).

[27] Brief for Intervenors in the Fifth Circuit, p. 21.

[28] New York assumes the same status as any other litigant including sustaining its burden of proof in proper situations such as seeking a stay order.

lected during the pendency of the appeal); third, no substantial harm to other persons; and fourth, where lies the public interest? The obvious harm to ODECO would have been the loss in revenue pending appeal. The loss to the general public would have been the failure to obtain needed gas supplies. However, these potential losses could have been equitably balanced against New York's challenge of the permanently certificated price by a stay order similar in theory to the orders in the cases previously cited. The court could have allowed ODECO to collect the rates granted in Opinion No. 327 during appeal and either pay the difference between the rate collected and the rate contended for by New York into escrow, or alternatively, require ODECO to collect a portion of its price subject to refund in the event New York prevailed on appeal and a lower rate was determined in the remanded proceedings. New York would have been protected on the rate question; the consumer would have received the benefits of needed gas supplies; and ODECO would have been permitted to make an informed determination of whether to dedicate its gas to interstate commerce on such terms and conditions.[29] *Sunray Mid-Continent Oil Co.* v. *FPC,* 270 F. 2d 404 (10th Cir. 1959). In addition, any party is entitled to file a motion requesting that a particular case be given preferential treatment on the court's docket because of the exigencies of the particular situation.

The instant case provides an excellent example of the ingenuity exercised by the courts in granting stays of Commission rate-making orders. The producers in the court below filed motions for stays with the Commission after the issuance of Opinion No. 398, requesting that the Commission issue a stay of the portions of its order requiring a rate reduction, a price moratorium, and refunds. In Opinion No. 398-A the Commission granted the stay for a period of thirty days after the conclusion of judicial

[29] ODECO would have had *notice* of its potential refund obligation and could have paid taxes, royalties, etc. accordingly.

review as to the portion of the order requiring refunds. (R. 606-17 at 615). However, the Commission refused to issue a stay of its rate reduction. Accordingly, when ODECO filed its petition for review with the Fifth Circuit, it also requested a stay of the portion of the Commission's order requiring rate reductions. On November 12, 1963, the Fifth Circuit granted ODECO's request for a stay with several conditions.[30]

The court below adopted New York's second excuse for failing to obtain a stay of the Commission's order in Opinion No. 327, *i.e.*, that the producers took the risk in commencing deliveries while their certificates were under judicial attack and should have sought interim protective relief from the Commission.[31] But the conclusion that ODECO took such a risk is nothing more than a "bootstrap" argument for it necessarily assumes that the Commission has retroactive refund power. This argument equates judicial attack with stay orders. If New York and the Fifth Circuit's thesis that the Commission has retroactive refund power is accepted then, of course, theoretically ODECO commenced deliveries knowing it might ultimately have to make refunds. But the existence of such extraordinary power is the very issue raised by ODECO on this appeal. The first time the Commission asserted such retroactive power was January 10, 1962, *two years after* ODECO commenced deliveries. However, as discussed above, the Commission has no retroactive refund power — thus ODECO did not take a risk as to price in commencing deliveries.[32]

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[30] A copy of this stay order is attached as Appendix 'A'.

[31] What interim protective relief? ODECO had a presumptively valid order which became operative unless stayed by the courts.

[32] ODECO did take a risk in dedicating its gas to interstate commerce since if the certificates were reversed it could not abandon deliveries without the express permission of the Federal Power Commission. ODECO also took the risk that if it expended any sums to effect deliveries they could not be recovered if after reversal the Commission refused further certification.

2. The Commission's Power to Issue Temporary Certificates Subject to a Refund Condition Provided Protection After Remand

The mandate following the reversal of Opinion No. 327 issued from the Court of Appeals for the District of Columbia Circuit on April 24, 1961. By motion dated June 21, 1961, New York asked the Commission to require ODECO and the other producers to file a bond to insure payment of any sums which "may have been and which may, in the interim, be collected unlawfully." New York asserted in the motion that under the provisions of Section 7(b) of the Natural Gas Act, ODECO's deliveries must continue; "however, notwithstanding the absence of any *valid,* outstanding certificate authority therefor, permanent or temporary, these deliveries have been and continue to be made at the very initial price levels authorized by the *invalid* certificate orders which were overturned solely because of lack of evidence to support the propriety of such prices." On July 10, 1961, in other remanded producer proceedings, Long Island Lighting Company, Philadelphia Electric Company, Public Service Electric Company and The United Gas Improvement Company (Long Island, *et al*) likewise filed a "Motion Requesting Commission to Provide Interim Consumer Protection in Compliance with Judicial Mandates." These companies were intervenors in the cases which resulted in reversals in this Court,[33] the Ninth Circuit,[34] and the Fifth Circuit.[35] Long Island, *et al* took the unqualified position that

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[33] *Public Serv. Comm'n* v. *FPC,* 361 U.S. 195, *vacating, United Gas Improvement Co.* v. *FPC,* 269 F. 2d 865 (3d Cir. 1959).

[34] *United Gas Improvement Co.* v. *FPC,* 283 F. 2d 817 (9th Cir. 1960) *cert. denied,* 365 U.S. 879 (1961).

[35] *United Gas Improvement Co.* v. *FPC,* 290 F. 2d 133 (5th Cir.) *cert. denied,* 368 U.S. 823 (1961); *United Gas Improvement Co.* v. *FPC,* 290 F. 2d 147 (5th Cir.), *cert. denied,* 366 U.S. 965 (1961).

the reversals vacated and set aside the Commission orders and that, "there can be little doubt that the producers under existing law are under a current obligation to refund any amounts ultimately found unlawful". Long Island, *et al* particularly expressed concern about Commission counsel's postion on brief in the Ninth and Fifth Circuits[36] stating:

> "It is possible that under Commission counsel's position (which we, of course, dispute, fn. 7), any amounts in excess of the price ultimately authorized for these sales *could not* be refunded as matters now stand."

Long Island, *et al* requested that the producers be required to file bonds or undertakings covering their alleged potential refund obligation back to the date of initial deliveries.

On July 27, 1961, the Commission issued an order vacating the permanent certificates previously issued to Socony Mobil Oil Company, Inc. in Opinion No. 315[37] which was reversed by this court in *Public Serv. Comm'n* v. *FPC,* 361 U.S. 195 (1959). The Commission took notice of New York's June 22, 1961 motion but stated that, "it would be unfair and unwise to redetermine Socony Mobil's application on the record as originally made." The Commission further stated:

> "Such redetermination cannot immediately be accomplished. In the interim, in view of Socony Mobil's obligations under Section 7(b) of the Act to continue service, we shall temporarily authorize continuation of sale herein, so that Socony Mobil will not be in violation

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[36] Cited fn. 35, 36, *supra.*

[37] Long Island, *et al* were parties to this proceeding. 20 FPC 264 (1958). This opinion, known as the *Transco-Seaboard* decision was subsequently consolidated with other certificate applications including ODECO's. The consolidated proceeding culminated in Opinion No. 398. Placid Oil Co., J. R. Frankel and Hassie Hunt, Respondents in Nos. 21, 22 and 31 in this Court are the only litigants remaining from that proceeding.

of Section 7(c) of the Act. We thereby recognize that Socony Mobil commenced deliveries in good faith.

"It is also reasonable, and the public convenience and necessity requires, that we condition our temporary authorization, as we did in the remanded *CATCO* proceedings (Docket Nos. G-11024, *et al.*), to protect the consumers of this gas but without prejudice to such final disposition of the application for a permanent certificate as the record may require. In so doing we shall grant Public Service Commission's request in part; we see no necessity, however, for requiring a bond or a corporate undertaking of Socony Mobil."[38]

The Commission then issued a temporary certificate stating in part:

"Temporary authorization be and is hereby issued to Socony Mobil Oil Company, Inc. in Docket No. G-13780 upon the condition that the rates charged shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-13780, including any provision for refund thereby imposed."[39]

This procedure was consistent with the Commission's action after the *CATCO* reversal in June, 1959. The Third Circuit issued its mandate in accordance with this Court's opinion on November 16, 1959. On November 17, 1959, the Commission issued temporary certificates to the *CATCO* producers "upon the condition that the rates charged shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-11049, including any provision for refund thereby imposed." The temporary certificates also provided that

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[38] The Commission was referring to New York's June 21, 1961 motion, previously noted.

[39] 26 FPC 203 (1961).

they would "be effective upon issuance of the court mandate."[40]

During this same period, June-August, 1961, the mandates from the Fifth[41] and Ninth Circuits[42] resulting from decisions reversing Commission orders granting certificates to The Superior Oil Company returned to the Commission. The Commission order, reversed by the Ninth Circuit, involved a sale by Superior to United Gas Pipe Line Company from the Block 76 Field in offshore Louisiana. After the mandate returned, Superior discontinued these deliveries and requested temporary authorization to resume the sales. By letter dated June 5, 1961, the Commission granted the temporary authorization with a refund condition in language quite similar to the *CATCO* temporary certificates (R. 384-85).

The order authorizing Superior's sale to Transcontinental Gas Pipe Line Corporation was reversed by the Fifth Circuit and Superior made a similar request for a temporary certificate on July 3, 1961. The Commission answered this request by telegram in which they stated that cessation of the sale had not been authorized and that "deliveries should be immediately resumed." (R. 385-386) Thereafter, various letters, the effect of which is disputed, were exchanged between Superior and the Federal Power Commission, but in any event on August 2, 1961, the Commission issued a temporary certificate with a refund condition similar to the *CATCO* certificates. (R. 388)

Finally, since the Commission had not acted on New

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[40] The temporary certificate issued to Tidewater Oil Company, one of the *CATCO* producers, is attached as Appendix B.

[41] *United Gas Improvement* v. *FPC*, 283 F. 2d 817 (9th Cir. 1960), *cert. denied*, 365 U.S. 879 (1961).

[42] *United Gas Improvement Co.* v. *FPC*, 290 F. 2d 147 (5th Cir.), *cert. denied*, 366 U.S. 965 (1961).

York or Long Island, *et al's* motions, Hope Natural Gas Company, the purchaser of ODECO's gas, filed a petition for a declaratory order. Hope stated that it had continued to pay for the gas involved in this proceeding at the prices made effective by the Commission in Opinion No. 327 and further stated that New York's June 21, 1961 motion had created an uncertainty. Hope asked the Commission to issue a declaratory order clarifying its position.

The Commission vacillated[43] until January 10, 1962,[44] when it issued an order in response to New York, Long Island, *et al,* and Hope's motions. The Commission reiterated the history of the proceedings stating at the outset:

> "In each of the above-captioned dockets we have heretofore issued unconditional permanent certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act. *These certificates are still outstanding,* but the proceedings are before us again as a result of either a judicial remand of our own grant or rehearing for the purpose of reconsideration, upon applications therefor duly filed under Section 19(a) of the Act." (Emphasis supplied). (R. 395)

The Commission noted in *Socony Mobil Oil Co., Inc.,* 26 FPC 203 (1961), it had been confronted with the same problem and had set aside Socony's permanent cer-

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[43] It is now clear that the Commission was having difficulty in resolving the hiatus created by the court's reversal for inadequate evidence to support a price and the reliance by all parties on the permanent certificate as authority for continuing service. See the Commission's Brief in the Fifth Circuit, p. 45 fn. 61.

[44] Twelve days after the January 10, 1962 order the Commission issued Opinion No. 351, the *"CATCO* remand". In that opinion, the Commission pointed out that it had issued temporary certificates with refund requirements on November 17, 1959, to the *CATCO* producers and stated that these *CATCO* producers had no choice whether to accept or reject the temporary certificates. 27 FPC 96 at 110 (1962).

tificate and issued temporary authority properly conditioned. The Commission concluded, however, that it was unnecessary to set aside ODECO's permanent certificates. The basis for the change in the Commission's procedure is shown in the following language:

> "We have concluded, as to all rates collected by the applicants for the sales involved in these proceedings, that we should explicitly impose upon each applicant, to the extent that we are empowered to do so, an obligation to refund any amounts collected in excess of the amounts which would have been collected under the rate or rates finally determined in these proceedings to accord with the requirements of the public convenience and necessity.
>
> "We find ample authority under Section 7, 16, and 19 of the Act so to protect the public interest, pending final disposition of the initial price questions herein. The producer-applicants have no vested rights to receive the benefits of an order issued by the Commission once such order has been remanded to the Commission because its findings could not be supported under existing law. Securities & Exchange Commission v. Chenery Corporation, et al, 332 U.S. 194; Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 145." (R. 398)

The Commission dismissed Hope's petition for a declaratory order pointing out that neither New York nor Long Island, *et al* had answered the petition or challenged the propriety of Hope's continuing to make payments in accordance with the contract rates filed by ODECO and the other producers.[45]

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[45] On brief in the Fifth Circuit, the Commission characterized its January 10, 1962 order as "merely declarative of the existing legal status". Brief p. 47. The Fifth Circuit summarily belittled the order by stating: "In our view, the order has no significance one way or the other." (R. 638).

Of course, there would never have been a problem if New York and Long Island, *et al* had followed the procedure commonly used by litigants contesting Commission orders approving rates. But since they failed to obtain a stay or other judicial relief, the Commission was faced with a dilemma created because courts do not prescribe proper rates when a regulatory agency's rate order is reversed. The ultimate holding of a court which reverses rate orders is either that the regulatory body applied incorrect principles in arriving at a rate or that there is no substantial evidence in the record before the court to support the rate. The court then remands the proceedings to the agency for a further hearing on the rate issue. The Commission is free to find a lower rate, the same rate or even a higher rate as long as it does so within the ambit of its statutory power and consistently with the principles enunciated by the reviewing court and as long as there is substantial evidence in the record to support the rate. The rate is not changed until the agency entrusted with regulating rates issues its order after remand.

When the mandate returned from the Court of Appeals, for the District of Columbia, ODECO and other producers maintained that the certificates were still valid until set aside by the Commission and that they should continue to collect the rate provided in the certificates until the certificates terminated or the rate was changed. The Commission agreed with this position (R. 395-405), but instead of vacating the certificates as it had done before in similar situations, it later decided to rely on whatever power it had to order retroactive refunds.

Even though New York failed to obtain a stay or other protective order during the pendency of its appeal, the Commission upon receipt of the mandate had a remedy

provided by the Natural Gas Act which would have permitted prospective refunds *from the time of the return of the mandate until it had had an opportunity for full review of a new record.* The Commission could have issued an order setting aside the permanent certificates previously issued to ODECO on the basis of the decision rendered by the reviewing court. After setting aside the permanent certificates, the Commission could then have issued temporary certificates with prospective refund conditions to ODECO to allow it to continue to make the sales.[46] The prospective refund condition, to be consistent with the *Sunray*[47] decision, should have contained a definite floor, *i.e.,* ODECO would have been obligated to refund any amounts collected in excess of 18¢, the price level urged by New York. A temporary certificate is issued if an emergency exists.[48] An emergency did exist at that time because the Commission was unable to immediately commence hearings to once again determine the public convenience and necessity rate. This procedure would have been workable and eminently fair to all concerned. ODECO would have realized from the beginning its possible maximum refund liability and could have planned accordingly. New York would have been protected since if it prevailed in urging a lower price, the Commission could order refunds.[49] However, the most attractive feature of this procedure is that it is authorized by the Natural Gas Act, while the retroactive refund method is not.

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[46] This procedure was followed in the remanded *CATCO* proceedings. See Appendix B, hereto.

[47] *Sunray Mid-Continent* v. *FPC,* 270 F. 2d 404 (10th Cir. 1959).

[48] "That the Commission may issue a temporary certificate in cases of emergency . . ." 15 U.S.C. 717f(c).

[49] In addition neither the producer nor the consumer would benefit from "administrative delay".

CONCLUSION

For these reasons, it is respectfully requested that the opinion below be vacated insofar as it affirms the Commission's power to order ODECO to refund amounts previously collected pursuant to the unconditional permanent certificates issued by Opinion No. 327 and that the United States Court of Appeals for the Fifth Circuit be directed to reverse the Commission's order directing ODECO to make such refunds.

Respectfully submitted,

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APPENDIX A

U. S. Court of Appeals
FILED
Nov. 12, 1963
Edward W. Wadsworth
Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20989

OCEAN DRILLING & EXPLORATION COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

STAY ORDER

Before TUTTLE, Chief Judge, and RIVES and GEWIN, Circuit Judges.

PER CURIAM:

We are controlled by the precedent set by this Court in the orders filed October 17, 1963, in No. 20872, Callery Properties, Inc. v. F.P.C., and in No. 20885, The Superior Oil Company v. F.P.C., granting stay of paragraphs (B) and (C) of the order of the Federal Power Commission issued July 17, 1963, accompanying its opinion No. 398.

It is therefore ORDERED by the Court that, upon motion of petitioner, paragraphs (B) and (C) of the Federal Power Commission's order of July 17, 1963, which is complained of by the petition in this proceeding, ordering, respectively,

a reduction in rates to 20¢ per Mcf and a moratorium on the filing of increased rates in excess of 23.55¢, are hereby stayed pending the further order of the Court, upon the following conditions.

(A) In the event and to the extent that the Commission's order is affirmed by final judgment in this proceeding (or, pursuant to remand, is duly confirmed in whole or in part by further lawful order of the Commission), petitioner shall refund to its respective pipeline purchasers, at petitioner's expense:

(1) Any amounts, together with simple interest at 7% per annum until repaid, collected for the sales of gas here involved which are in excess of the amounts it would have been permitted to charge, absent a stay, under the terms of the Commission's order; and

(2) Any amounts collected under any increased rates which petitioner shall duly file with the Commission pursuant to Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), which it is prohibited from filing under the terms of the Commission's order, but for this stay, and which shall be collected in accordance with such lawful orders as the Commission shall issue with respect to such filings under Section 4(e) of the Act, 15 U.S.C. 717c(e), together with simple interest thereon at the rate of 7% per annum until repaid.

Such amounts, however, shall be paid to and held by the purchaser pipelines for the benefit of themselves or of such class of direct or indirect customers as shall have borne the burden, substantially, of the excess collections.

(B) Simultaneously, with the filing of any increased rate above 23.55¢ per Mcf, petitioner shall submit to the Commission all the material upon which it relies in justification of such increased rate filing, in a form which will constitute its case in chief in support of such rate at a Commission hearing to determine the lawfulness thereof.

APPENDIX B

Address All Communications
To The Secretary

FEDERAL POWER COMMISSION
WASHINGTON 25

Docket No. G-11049
Tidewater Oil Company

AIRMAIL

Nov. 17, 1959

Tidewater Oil Company
P. O. Box 1404
Houston 1, Texas

Attention: Wm. H. Vaughan, Manager
Gas Utilization

Gentlemen:

Temporary authorization is hereby issued to Tidewater Oil Company in Docket No. G-11049 upon the condition that the rates charged shall be subject to such conditions as the Commission shall lawfully prescribe in issuing a permanent certificate in Docket No. G-11049, including any provision for refund thereby imposed.

This authorization shall be effective upon issuance of the court mandate in *Public Service Commission of the State of New York* v. *Federal Power Commission* and *Long Island Lighting Company and Public Service Electric and Gas Company* v. *Federal Power Commission,* Nos. 12,401 and 12,403 (C.A.3d).

This is without prejudice to such final disposition of the application for certificate as the record may require.

By direction of the Commission.

/s/ J. H. Gutride
Secretary